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IN THE
Supreme Court of the United States

October Term, 1976

No. 76-811

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Petitioner,

v.

ALLAN BAKKE,
Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF OF THE STATE OF WASHINGTON AND THE UNIVERSITY OF WASHINGTON AS AMICUS CURIAE

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INTEREST OF AMICUS CURIAE

The State of Washington, and its University of Washington, as amicus curiae seek to preserve the right of the University to serve the interests of all of its students in education for life and careers in a pluralistic, multi-racial society; to alleviate gross under-representation of minority races in professions for which the University provides education; to contribute to overcoming pervasive and invidious racial discrimination which, but for

preferential admissions programs, could make the University and its schools and departments segregated, tax-supported purveyors of education for the white majority race, in fact if not in law.

The State of Washington operates a system of higher education which includes two state universities, four statewide colleges and some 28 community colleges. Its largest university is the University of Washington, founded in 1861. The University is governed by a Board of Regents of seven members appointed by the Governor and confirmed by the state Senate. The University has more than 35,000 students, nearly a fourth of them enrolled in graduate or professional programs. Included are programs leading to professional degrees in law, medicine, dentistry, nursing, public affairs and social work, and graduate programs leading to the Ph.D. degree in most of the academic disciplines.

While the Board of Regents has the responsibility for admissions policies for its schools and departments, implementation of policy decisions is delegated to the deans and faculty of the various schools and colleges. The Board has directed the graduate and professional schools to "continue to recognize the need for greater representation of minority groups which are under-represented in their professions and/or academic ranks by developing, enunciating and implementing admissions policies which are consistent with the fulfilment of this need."[1]

Each of the schools and colleges has its own admissions program. Each seeks to increase the numbers of qualified but un-

1. Resolution of the Board of Regents adopted June 13, 1975, appended as Appendix A to this amicus brief.

der-represented minorities among its students and in the profession it serves. None of the admissions programs sets aside a fixed number of seats for qualified minority applicants, as the University of California-Davis medical school does, but all of them consider favorably the minority race of applicants when determining who, among more qualified applicants than can be admitted, shall be admitted to the limited number of places available.

The University of Washington law school's program was the first such program challenged by a disappointed applicant who contended that he had been unconstitutionally discriminated against on the basis of his Caucasian race. Marco DeFunis, Jr. was that plaintiff. He persuaded the trial court that he had been discriminated against because the Constitution is "color blind," but the Supreme Court of the State of Washington reversed, stating in part:

> "The state has an overriding interest in promoting integration in public education. In light of the serious under-representation of minority groups in the law schools, and considering that minority groups participate on an equal basis in tax support of the law school, we find the state interest in eliminating racial imbalance within public legal education to be compelling."[2]

The court further held that:

> "The consideration of race in the law school's admissions policy meets the test of necessity here because racial imbalance in the law school and the legal profession is the evil to be corrected, and it can only be corrected by providing legal education to those minority groups which have been previously deprived."[3]

2. *DeFunis* v. *Odegaard*, 82 Wn.2d at 33, 507 P.2d 1169 (1973).
3. *Id.*, at 35.

This Court granted certiorari and heard arguments, but decided that the case was moot because of the impending graduation of the plaintiff.[4] This Court vacated the judgment and remanded the case to the state court for such action "as it may deem appropriate." On remand, four of the Washington Justices would have reinstated the previous judgment of the State Supreme Court, three Justices declined to vote for reinstatement for varying reasons, none of which involved the merits of the previous decision of the court, and the two original dissenters remained in dissent.[5] The Supreme Court of the State of Washington has only recently reaffirmed its position taken in its original *DeFunis* decision in a unanimous decision in *State Employees* v. *Higher Education Personnel Board*.[6] Furthermore, it has cited its original *DeFunis* decision to support its conclusion that selective certification (preferential treatment for under-represented minorities in hiring) was necessary in order for the city of Seattle to comply with Title VII of the Civil Rights Act of 1964 and achieve "a fair approximation of minority representation in city employment."[7]

The University of Washington's medical school also seeks to increase the number of certain minorities within its classes. They have chosen a different approach from the law school (and the University of California-Davis) because their admissions program generally has different goals. Seriously considered candidates for the limited places available are with certain exceptions limited to residents of Washington, Alaska, Montana and Idaho. Fixed numbers of seats are set aside for residents of Idaho, Alaska and Montana in accordance with

4. *Defunis* v. *Odegaard*, 416 U.S. 312.
5. *DeFunis* v. *Odegaard*, 84 Wn.2d 617, 529 P.2d 438 (1974).
6. 87 Wn.2d 823, 557 P.2d 302 (Dec. 16, 1976).
7. *Lindsay* v. *Seattle*, 86 Wn.2d 698, 548 P.2d 320 (April 1976).

agreements between those states and the State of Washington in recognition of the inability of those states to provide medical education at their own universities because of limited resources. In order to assure that Blacks, Chicanos and American Indians are represented within the student body, their applications are seriously considered regardless of place of residence. In the view of the medical school admissions authorities this gives the school the best chance of having qualified minorities within the class ranks and ultimately within the profession.

Other graduate and professional schools at the University of Washington approach the need in ways that best serve their overall educational needs and public purposes. But all of them approach it, and seek solutions within their admissions policies and in accordance with the regents' mandate.

Other state and local agencies of Washington have been vigorous in taking and supporting affirmative action to correct the effects of past racial discrimination in both employment and education. Most of these steps have not been taken because of court orders or compulsion by federal agencies in order to comply with federal civil rights laws or executive orders. They have been undertaken voluntarily by the agencies to meet the perceived and acknowledged need to correct the effects of slavery, segregation and discrimination against certain insular minorities within our society who by the very fact of past racially-biased, legally-sanctioned discrimination would still be denied equal opportunity to the educational and employment opportunities available in the state of Washington without such programs.

If this Court were to affirm the decision of the Supreme Court of California in *Bakke v. Board of Regents*,[8] the programs that the Washington Supreme Court has found necessary to further the compelling interests of the state could be destroyed or crippled. For that reason, the State of Washington as amicus curiae urges the reversal of the decision of the Supreme Court of California.

QUESTION PRESENTED

While the question presented could be stated in the narrowest form, because of the broad sweep of the lower court's decision we believe, for the purposes of this brief, it must be stated as follows:

Does the United States Constitution preclude a state-supported university from considering minority race as an affirmative factor in its selection from among qualified applications for admission to a limited number of places within its student body?

A bewildering array of subsidiary questions might be stated, primarily because through history, prior to *DeFunis v. Odegaard*, from the creation of the Freedman's Bureau after the Civil War to the most recent implementation of affirmative action programs by the United States government, discrimination by any minority race against the majority race has been (as we think it largely remains) a non-problem. Some of those questions:

1. Does the same strict scrutiny standard apply when the purpose and effect of the allegedly discriminatory program are

8. 18 C 3rd 34, 132 Ca R 680, 553 P.2d 1152 (1976).

to benefit a minority, as in a program where the motive is neutral or malign?

2. If a compelling state interest is required, either absolute or on a relative scale, what weights are to be attached to factors such as the following:

a. Gross under-representation of minority race in the profession for which a school educates.

b. Former participation by the institution challenged in invidious discrimination for which the program is remedial and compensatory.

c. Absence of workable surrogate qualifications like "culturally deprived," "impoverished," "educationally handicapped," or "disadvantaged" to identify members of minority races without saying so, or in a "racially neutral" way.

d. The educational judgment of the faculties and administrators that the ends of education for all students are importantly served by a student body which is not monolithic in racial composition.

3. Must there be a showing of past discrimination by an agency in order to justify its ameliorative program?

4. Is a fixed number (or fixed percentage) of minority admittees in the University of California-Davis program, which differentiates it from the greater flexibility of other programs, a negative or a positive factor? In determining this, what weight should be given to invidiousness of discrimination, the compelling quality of the state interest, and scrutiny of race as a suspect category?

We assume that the Court granted its Writ of Certiorari because it believed that the time might be ripe to answer the fundamental question. If it finds that the record and the briefs are not adequate to justify a decision which would answer our question in the negative, then we urge disposition on the narrowest grounds possible.

SUMMARY OF ARGUMENT

Is "reverse discrimination" a term which belongs in the lexicon of Fourteenth Amendment law? This Court has recognized the validity of race conscious policies and programs to correct the effects of past racial discrimination.

Voluntary programs by state universities designed to increase minorities in educational programs in which they have been grossly under-represented are critical to the nation's effort to erase the effects of historical racial discrimination, segregation and slavery. The authority of state institutions to undertake such programs is critical to their ability to design educational programs which they deem to be in the best interest of their students.

To affirm the lower court's decision would either eliminate altogether efforts by state institutions to integrate their professional and graduate schools, opening access to the professions and academic ranks to minorities long excluded, or at best would require those institutions to retreat into obfuscation by camouflaging legitimate programs designed to achieve legitimate goals by manipulating labels to fit within a judicially-imposed iron rule of law.

Such a consequence would deny institutions of higher education the opportunity to test and experiment in areas where their expertise prevails.

The validity of programs such as that challenged here under the Fourteenth Amendment need not be measured against the strict scrutiny test which was designed to protect discrete and insular minorities from restrictions imposed by the majority on their constitutionally-protected rights. Nor should such voluntary programs be limited to institutions which have a history of racial discrimination and segregation.

The State of Washington is especially interested in the outcome of this case because its highest court has upheld voluntary programs undertaken by its institutions of higher learning necessary to fulfill the compelling interest of the state. An affirmance by this Court of the California Supreme Court would seriously jeopardize, if not eliminate, those programs.

ARGUMENT

I

INTRODUCTION

Many of the arguments on the issues presented in this case were thoroughly briefed, not only by the parties in the *DeFunis v. Odegaard* litigation before this Court, but by many amici curiae. It is not our purpose to repeat those arguments in this brief. They all have been published in a three-volume work, *DeFunis v. Odegaard and the University of Washington: University Admissions Case, The Record* (Oceana Press 1974), Ann Fagan Ginger, ed.[9]

The facts of this case differ from those presented to this court in *DeFunis v. Odegaard* in that here the medical school set

9. When reference is made to the briefs submitted in the *DeFunis* litigation, reference will be made to the Ginger publication.

aside a fixed number of seats for "disadvantaged" minority persons whose admission applications were to be examined by a separate admissions committee of the school. If the seats so set aside could not be filled by qualified disadvantaged applicants, those not filled would be available for applicants in the regular pool. In fact, at least in the years in question (1973 and 1974), all the seats made available for the special program were filled by minority applicants.

In the *DeFunis* case, no fixed number of seats were set aside by the law school for minority applicants. A separate subcommittee of the law school's admission committee examined the applications of those identified as minorities and made its recommendations to the admissions committee. The law school was not necessarily seeking *disadvantaged* minorities. It was seeking a sufficient number of qualified minorities to assure their reasonable representation in the law school and the legal profession. The law school concluded that without special consideration that goal could not be achieved. Though it was argued by some of the *amici* in support of Mr. DeFunis that the law school program amounted to a "quota system," there was no fixed number of seats assigned for minorities and the program was concededly designed to increase the number of minorities, not to limit them.[10]

While the court below did not ground its decision solely on the fact that the medical school set aside a fixed number of seats for its special admissions program, it stated that "it is difficult to avoid considering the University scheme as a form of an educational quota system," which it condemned as "thoroughly discredited."[11]

10. II Ginger 564, n.11.
11. Pet. for Cert. 36a.

It is not our purpose to defend a strict quota system as a justifiable means of achieving the legitimate, if not compelled, purpose of racial integration in the educational programs offered by our states' colleges and univerities. We are here because if there is affirmance at all by this Court it would seriously jeopardize programs which the Supreme Court of Washington has found necessary to fulfill that state's compelling interest after the closest judicial scrutiny. If this Court believes that the "quota" defined by the California court disqualifies the University of California-Davis admissions policy, we believe the Court should limit its holding to that conclusion.

II.

THE FOURTEENTH AMENDMENT DOES NOT PROHIBIT A STATE INSTITUTION OF HIGHER EDUCATION FROM CONSIDERING THE RACE OF UNDER-REPRESENTED MINORITY APPLICANTS WHERE THE PURPOSE AND EFFECT IS TO INCREASE THEIR NUMBER IN ITS EDUCATION PROGRAMS

The history of the Fourteenth Amendment, as this Court well knows, has been a contorted one. In 1880 this Court said that the Fourteenth Amendment should be construed liberally to carry out the purposes of its framers.[12] Yet three short years later, in *The Civil Rights Cases*,[13] it narrowly construed the powers of Congress under Section 5 of the Amendment as merely "counteracting the effect of state law, or state action, prohibited by the Fourteenth Amendment."[14] Then in 1896 the Court, in *Plessy v. Ferguson*,[15] pronounced what the first Mr.

12. *Strauder v. West Virginia*, 100 U.S. 303 (1880).
13. 109 U.S. 3 (1883).
14. 109 U.S. 3 at 24.
15. 163 U.S. 537.

Justice Harlan in dissent declared as the "pernicious" doctrine of permitting states to enact statutes separating their citizens on the basis of race in public facilities so long as the facilities that were separate were nominally "equal." These decisions gave constitutional sanction to Jim Crow laws which persisted in large parts of this country until this Court, in 1954, ruled that segregation of itself violates the Fourteenth Amendment's equal protection clause.[16] That case, as many subsequent rulings of this Court affirmed, rejected legally-sanctioned segregation, but it could not erase the effects of generations of segregation preceded by centuries of slavery based on race. It did not end segregated education.

Brown v. Board of Education in 1954 was a group of cases consolidated for hearing in which all the plaintiffs were black. The beneficiaries of that decision, however, were all people of the entire nation. Nevertheless, the first and immediate palpable wrong treated in the decision was that suffered by the black plaintiffs. That decision has not been fully implemented after more than a score of years. It would be a wrong surpassing *Plessy v. Ferguson* or the *Civil Rights Cases* to hold, when the children of those original plaintiffs are now reaching an age to seek admission to a professional school, that they are barred by fiercest competition, that the first Justice Harlan's inspired metaphor that the Constitution is "color blind" has been metamorphosed into jurisprudence which denies a state every effective means of even mitigating conditions under which a black law student or a black medical student may be too rare even to be considered a "token."

To have held that the Fourteenth Amendment (or its component in the Fifth Amendment) outlawed the Freedmen's Bu-

16. *Brown v. Board of Education*, 347 U.S. 485 (1954).

reau, all federal aid to Howard University, and all federal efforts to curb the Ku Klux Klan, would be no more bitterly ironic than affirmance, without qualification, of the *Bakke* decision. Under *Plessy v. Ferguson*, establishment of a "separate but equal" school or university was at least an alternative. Responses to the problem of minority exclusion have varied greatly, even within the schools and departments of a single university. There is no prescription for an ideal solution, but it is clear there can be no solution if all avenues of experiment are foreclosed.

We would not only freely concede, we would assert, that the problem manifest in *Bakke* and *DeFunis* is temporary, that a time when race is irrelevant to admission to a university will come. Wisdom in the entire academic community is divided as to the best way to bring this about, but there has been no substantial division in the recognition that an all-white student body in a medical school, a law school or a graduate school of business cannot be accepted as a permanent norm. Affirmative measures, necessarily experimental, necessarily subject to care and scrutiny of professional educators, oriented to the educational needs of the institution and of the constituent professions, are imperative. We are confident that this Court will not hold that the Constitution prohibits all good faith attempts to find a solution.

A. Where the purpose and effect of the racial classification is not to discriminate against persons on the basis of their race, the classifications will be sustained if they are rationally related to a legitimate state purpose.

The Supreme Court of California has held in this case that the admissions policy at the University of California-Davis medical school discriminated against plaintiff because of his white race. There is nothing in this record that supports that

conclusion. The record shows that of the 100 seats open for medical school admission, 84 went to white applicants and only 16 went to minorities.[17] There is nothing in the record that shows the purpose of the policy was to exclude white persons. On the contrary, the purpose was to include a reasonable proportion of minorities who, without the admissions policy, could not be admitted.

In a university where resources are finite and limited, one additional black student means one fewer white student. Adding one chair to the 100 already in the classroom crowds 100 occupants of chairs already there, not only for space but for the time and attention of the professor, for access to the resources necessary for the students' education. As intended punishment for 100 white students for the sins of their ancestors in tolerating slavery, this would be impermissible. If there were evidence in the record that such a purpose existed, the ultimate in scrutiny would be expected. No such issue exists in this case. The issue is whether, in the allocation of resources, the explicit purposes of offering remedial opportunity to a minority, improving the educational experience of students whose school would otherwise be majority-segregated, and ameliorating the non-representation of minority races in the professions, the Constitution has been offended.

In *United Jewish Organizations etc. v. Carey* (UJO),[18] it has been reiterated that a disproportionate effect, even on a minority within a minority, does not make a case of discrimination under the Fourteenth Amendment.

As stated by Justice Stewart in his concurring opinion:

17. Pet. for Cert. 2a.
18. ____ U.S. ____, 97 S.Ct. 996 (1977).

> "Under the Fourteenth Amendment the question is whether the [reapportionment] plan represents purposeful discrimination against white voters. Washington v. Davis, 426 U.S. 229 (1976)."[19]

That, indeed, is the question before this Court in this matter: Does the admissions plan at the University of California-Davis medical school *purposefully* discriminate against white applicants?

The majority opinion of the court below recognizes that the major purpose of the program "was to promote diversity among the student body and the profession and to increase the numbers of doctors practicing in the minority community, where the need is great,"[20] and was even willing to concede, *arguendo*, that the objectives served a compelling governmental interest.[21]

Mr. Justice Brennan, in his concurring opinion in *UJO, supra*, observed:

> "I begin with the settled principle that not every remedial use of race is forbidden. For example, we have authorized and even required race conscious remedies in a variety of corrective settings. See, e.g., *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 25; *United States v. Montgomery Board of Education*, 395 U.S. 225 (1969); *Franks v. Bowman Transportation Co.*"[22]

He concluded, in concurring that the reapportionment plan of New York should be upheld, that

> " 'the invidious and pervasive' evil of voting rights violations . . . and, the 'specially informed legislative competence in

19. 97 S.Ct. at 1017.
20. Pet. for Cert. 10a.
21. *Id.*, at 23a.
22. 97 S.Ct. at 1013.

this area, argue in support of the legitimacy of the federal decision to permit a broad range of race-conscious remedial techniques including, as here, outright assignment by race." (Citations omitted)[23]

Just as the state legislature was considered especially competent and informed to deal with "the invidious and pervasive evil of voting rights violations," this Court has recognized the special competence of educational authorities to deal with the consequences of past racial discrimination to educational programs and opportunities.[24]

Mr. Justice White, in delivering the judgment of the Court in *UJO*, observed, in upholding the reapportionment plan:

"There is no doubt that in preparing the 1974 legislation, the state deliberately used race in a purposeful manner. But its plan represented no racial slur or stigma with respect to whites or any other race, and we discern no discrimination violative of the Fourteenth Amendment nor any abridgement of the right to vote on account of race within the meaning of the Fifteenth Amendment."[25]

Nothing in the decision of the court below or in the record before it suggests that Mr. Bakke or any other rejected applicant to the medical school sustained a racial slur or stigma by reason of his or her rejection.

The California Supreme Court in this case said that the Court was not requiring the University of California-Davis medical school to rely solely on test scores and grade point averages and other quantitative criteria to determine who should

23. *Id.*, at 1015.
24. See, e.g., *Swann v. Charlotte-Mecklenburg Board of Education*, 401 U.S. 1.
25. *Id.*, at 1009-10.

be admitted to its school,[26] but because it insisted upon measuring the program against the compelling interest test, it went on to examine whether other alternatives might be available which the Court judged were less obnoxious. It suggests "flexible admissions standards," "aggressive programs of recruitment and remedial schooling for disadvantaged students of all races," and increasing the number of seats in the state's medical schools. None of the Court's suggested alternatives addressed the purpose of the admissions program under attack and therefore were not alternatives at all! To utilize any of them for that purpose would be to accept the Court's implicit invitation to engage in subterfuge, which we believe to be one of the more frightening implications of the opinion.

History makes very clear the dangers of administering programs with racial impacts in an invisible manner. The problem is so delicate that it needs to be handled in the open, where tactics can be seen and discussed, where consequences can be identified and appraised, and where policies can be articulated and clarified. The California court's exercise in judicial legislation and administration illustrates why the compelling interest test should be confined to the situations explicitly set forth by this Court. To expand its application, as the California court has done here, dangerously extends the judicial role in the administration of programs which legislatures have wisely left to experts.

Professor Archibald Cox, in his amicus curiae brief on behalf of the President and Fellows of Harvard College in *DeFunis v.*

26. Pet. for Cert., p. 26a. Indeed, were the plaintiff here black and had the medical school relied solely on such criteria, a challenge to the process might well have been sustained as racially disciminatory. Cf. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

Odegaard,[27] explained why the *DeFunis* case was an issue vital to public and private education. He emphasized the dangers of substituting an iron rule of law for the discretion of academic authority to make a conscious selection of qualified students from the greatest variety of cultural, social and economic backgrounds in order to improve the educational experience of the whole student body.[28]

Within the universities can be found more awareness of the weakness of aptitude testing, more experimentation to produce not only more sensitive tests, but alternatives to all tests.[29] We urge this Court to recognize that its alternatives do not include, in any meaningful sense, ordering professional schools to do what they are now doing, except to do it in some undefined way better. Unless the Court assumes only the narrowest of the issues raised by this case, the alternatives are these: (1) disregard race as an explicit consideration in all admissions programs, (2) identify substitute criteria for race, such as "educational disadvantage" which six years ago were code words for "race" by those administrators who share a vague perception that the Constitution might be "color blind."

The second alternative is not a true alternative. A school could, of course, put "race" among the miscellaneous and unspecified judgmental factors included in personal interviews in order to achieve its legitimate goal of integration. But this is precisely what Justice Tobriner in his dissent below properly criticized as "a manipulation of labels, so that the perfectly

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27. Vol. II, Ginger, p. 851.
28. *Id.*, p. 873.
29. For an extensive study of what medical colleges throughout the country have done to increase minorities within the medical profession see Odegaard, *Minorities in Medicine*, Josiah Macy Jr. Foundation, April 1977.

proper purposes of the program must be concealed by subterfuge." Justice Tobriner did not concur "in this retreat into obfuscating terminology,"[30] nor do we.

But respondent contends, and the lower court agreed, that, notwithstanding the legitimacy of purpose of the special admissions policy, he was discriminated against because without the policy he would have been admitted to one of the seats taken by a "less qualified" minority. In other words, while there may have been no invidiously discriminatory *purpose*, the alleged discriminatory effect of the program upon him disqualifies it under the Fourteenth Amendment.

Respondent's grievance is not unlike that of the white employees of Bowman Transportation Company in *Franks v. Bowman Transportation Co.*[31] Those employees contended that relief under Title VII of the Civil Rights Act to certain minorities who had been discriminated against in violation of the Act would impermissibly harm innocent white employees. Yet this Court ordered that the victims of discrimination be awarded seniority status notwithstanding the adverse effect on other white employees:

> "If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed [citations]."[32]

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30. Pet. for Cert., p. 76a.
31. 424 U.S. 747, 96 S.Ct. 1251 (1976).
32. 96 S.Ct. at 1264. The difference between the respondent's position and that of the white employees of Bowman Transportation Co. is that those employees' property rights to a place on the seniority ladder were detrimentally affected. Respondent here has no property right or fundamental right which is affected by the challenged admissions policy. Cf. *Rodriguez v. San Antonio School Dist.*, 411 U.S. 1 (1972).

Surely, if Congress, under Section 5 of the Fourteenth Amendment, may authorize relief to victims of discrimination even though that relief adversely affects others, a state must be permitted voluntarily to effect remedial programs designed to ameliorate the effects of past discrimination by assuring greater access to its programs for those groups which have been the victims of historical discrimination. This is a national policy objective which this Court has described as "of the highest priority."[33]

No issue is presented in this case as to what any educational institution may be compelled to do to effectuate the purposes of the Fourteenth Amendment. The issue in this case is what educational institutions may be prohibted from doing in their efforts affirmatively to effectuate the purposes of the Amendment. If the University of California, or any other state university, errs in depriving sons and daughters of any majority, racial or otherwise, the primary source of correction is the voters and the legislature. If this Court errs, and affirms the *Bakke* decision on any but the narrowest of grounds, it risks bringing to a halt all programs and policies which have been regarded as permissible since the beginning of reconstruction after the Civil War. That consequence would be more costly to the nation, and to the education of all citizens, than any error since 120 years ago when this Court decided *Dred Scott* v. *Sanford*.

The question to be answered yes or no is whether universities and colleges are forbidden to take into account in any way the race of the students who apply for admission. We doubt that the California Supreme Court can have understood the case in that way, because the California Supreme Court be-

33. *Id.*, 96 S.Ct. at 1271.

lieves there are ways to achieve the objectives of these programs that will work better. There may be better ways, but we shall never learn them if this Court puts a stop to the process of learning by experience to achieve better the goals of education for all races, colors, creeds, and both sexes, which make up our states and nation.

B. The California Supreme Court erred when it purported to subject the medical school's admissions policies to "close judicial scrutiny."

The California court, in subjecting the medical school's admissions policy to the so-called "compelling interest" measure applicable to suspect classifications, stated:

> "We cannot agree with the proposition that deprivation based upon race is subject to a less demanding standard of review under the Fourteenth Amendment if the race discriminated against is the majority rather than the minority. We have found no case so holding, and we do not hesitate to reject the notion that racial discrimination may be more easily justified against one race rather than another, nor can we permit the validity of such discrimination to be determined by a mere census count of the races."[34]

This statement of the court assumes a situation which was not before it. We would certainly agree that any charge of racial discrimination by a public educational institution should be taken seriously, fully and closely scrutinized to the extent necessary to provide assurance that it is not well founded. A statute or a practice prescribing the outcome of any competition based on the race of the competitor could not be constitutionally justified. This would still be true even if the majority or minority status of a race were determined by census count.

The California court failed to cite any case which holds that

34. Pet. for Cert. 18a-19a.

a remedy such as that adopted by the college here must be justified as necessary to fulfill a compelling interest. True, the Washington Supreme Court, in *DeFunis v. Odegaard*, 82 Wn.2d 11, subjected the law school's admissions policy to that scrutiny and said that the policy was necessary to fulfill a compelling interest of the state. However, we suggest that this Court has never suggested that state policies designed to correct the inequities suffered by such minorities are suspect.

The genesis of the so-called two-tier scrutiny test can be found in Justice Stone's footnote 4 in *United States v. Carolene Products Co.*,[35] where he stated that in the case under consideration it was not necessary to consider whether the legislation should be subjected to a more exacting judicial scrutiny under the general provisions of the Fourteenth Amendment which might be required were the Court considering

> ". . . whether prejudice *against discrete and insular minorities* may be a special condition which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." (Emphasis supplied)

What obviously concerned Mr. Justice Stone was the vulnerability of *minorities* to government actions approved by the majority which may deny minorities protection afforded by the Constitution. There could be and were circumstances where government actions based on racial classifications had such purpose and effect, and the Court could properly subject such actions to the closest judicial scrutiny to determine if they could be justified by some compelling state interest.[36]

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35. 304 U.S. 144 at 152-153.

36. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 80 (1943).

The California court, by asserting that no "less demanding standard of review" is required if the race discriminated against is the majority, merely evidences its failure to grasp the underlying rationale for the two-tier scrutiny test for judicial review of government classifications under the Fourteenth Amendment.

Strict scrutiny would be appropriate if California's population were made up of a majority of Blacks and Chicanos, its legislature were controlled by them, and they predominated on the board of regents, and the complaint still were made by a white person. This record does not even suggest that situation. Strict scrutiny should not apply to official action where a white majority (legislators, regents or medical school administrators) apportion benefits among whites and minorities in order to correct the effects of historical racial discrimination.

This Court has wisely rejected recent invitations to strictly scrutinize classifications alleged as suspect, and thereby engage in judicial legislation. In *Kahn v. Shevin*[37] this Court refused to grant relief to a widower who claimed that the Florida tax law giving widows a tax exemption was a denial of his rights under the equal protection clause. In reaching its conclusion, the majority of this Court, with Mr. Justice Douglas writing the opinion, examined the *purpose* of the legislation, which was to reduce the disparity between the economic disabilities of men and women. It found that the questioned preference to widows "rests upon some ground having a fair and substantial relation to the object of the legislation." Even if *Kahn v. Shevin* had been decided on the basis of strictest scrutiny, there would still have been obvious steps open to a Florida legislature by

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37. 416 U.S. 461 (1974).

way of correction: tax exemptions to all surviving spouses, to all poor spouses below specified levels of wealth or income, etc. Affirmance of *Bakke*, whatever is said about scrutiny, compelling qualities of the interest, or degree of suspicion would leave no such alternatives open.

In *Morton v. Mancari*,[38] decided in the same term as *Kahn*, the Court unanimously upheld the constitutionality of the preference in employment and promotion offered to Indians under the Indian Reorganization Act of 1934 against a challenge by non-Indian Bureau of Indian Affairs employees, who challenged the preferences as both contrary to the Equal Employment Opportunity Act of 1972 and the equal protection component of the Fifth Amendment of the Constitution. In reaching its conclusion, the Court noted the long history of discrimination against Indians and the disadvantages they sustained by reason of that discrimination in employment opportunities. This, coupled with the fact that the Bureau of Indian Affairs manages the affairs of Indians, justified, in the eyes of the Court, the act of Congress giving preferential treatment to Indians in employment by the Bureau of Indian Affairs, even though the Court recognized that displacement of non-Indians was "unavoidable if room were to be made for Indians."[39] Although the Court, in making its determination, was careful to point out that "the preference is not directed toward a 'racial' group consisting of 'Indians,'[40] there was no denial that the claimants were excluded from employment because they were *not* Indians, in the same way that plaintiff in this case contends he was excluded from the medical school program because he was not a racial minority.

38. 417 U.S. 535 (1974).
39. 417 U.S. at 544.
40. 417 U.S. at 544.

C. The California court erred in requiring a showing of past discrimination as necessary to justify a voluntary preferential program designed to remedy the effects of historical discrimination.

The California court was unpersuaded by the many cases in a variety of federal circuits which upheld the court-ordered racial preferences and quotas in employment in order to remedy past discrimination, saying that there was "no evidence in the record to indicate that the University has discriminated against minority applicants in the past."[41] It made the startling statement that "it is unconstitutional reverse discrimination to grant a preference to a minority employee in the absence of a showing of prior discrimination by the particular employer granting the preference. *Obviously, the principle would apply whether the preference was compelled by a court or voluntarily initiated by the employer.*" (Emphasis supplied)

The alarming consequences of an affirmance of that holding would be the termination of all affirmative action programs in all institutions of higher education which do not have a history of racial segregation.

We believe a more reasoned approach was taken by the court in *German v. Kipp*,[42] which refused to reach the conclusion of the California court, stating that it ". . . in effect would require employers to admit past discrimination or wait until they were sued by a minority individual and compelled to implement affirmative action." Such a conclusion, the court stated, would "contradict the spirit of the Fourteenth Amend-

41. Pet. for Cert. 31a.
42. ___ F.Supp. ___, U.S.D.C. W.Mo. (April 7, 1977).

ment and its mandate to remove not only the incidence of discrimination, but its effect as well . . ."

III

AFFIRMANCE OF THE COURT BELOW WOULD DENY STATE EDUCATIONAL AUTHORITIES THE DISCRETION THEY REQUIRE TO FORMULATE AND IMPLEMENT EDUCATIONAL PROGRAMS DESIGNED TO BENEFIT ALL OF THEIR STUDENTS.

This Court has long recognized the right of school authorities to take account of race in forming and effectuating nondiscriminatory educational policies. As the Chief Justice said, speaking for the Court in *Swann v. Charlotte Mecklenburg Board of Education*:[43]

> "School authorities are traditionally charged with broad powers to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities . . ."

But general affirmance of the court below would deny school authorities that very ability and at a critical time in the nation's history. Within the past decade opportunities have been opened up to minorities traditionally denied access to our institutions of higher education, and particularly to their graduate and professional programs. Progress has been made primarily because of the voluntary efforts of institutions across the country to undertake race-conscious programs similar to the

43. 402 U.S. 1, 16 (1971).

one challenged here. The achievement of the goal of a truly integrated society is far from accomplished. To stop those efforts before that goal is achieved because of a rigid and narrow constitutional doctrine such as that enunciated by the lower court would be a tragic setback to the nation.

There are those who have criticized the University's admission policy challenged here as inept. To deny our institutions of higher education the opportunity to experiment with a variety of methods to achieve the goal of truly integrated educational programs, truly integrated professions, and truly integrated faculties because of the ineptness of one experiment would do grave injustice to the nation and to the educational institutions serving it.

CONCLUSION

The judgment of the Supreme Court of California should be reversed.

Respectfully submitted.

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APPENDIX A

RESOLUTION

WHEREAS the University of Washington provides unique educational opportunities, particularly in its graduate and professional schools, and

WHEREAS those educational opportunities are of particular importance in helping fulfill the nationally recognized need to increase the number of under-represented minorities and women in certain of the academic ranks and professions, and

WHEREAS the University has a special ability to provide the necessary undergraduate educational opportunities which can increase the number of qualified minorities and women for consideration for admission into the graduate and professional schools both at the University of Washington and at other institutions of higher education, and

WHEREAS the deans, chairpersons, faculties and students of the graduate and professional schools are committed to the continuing development of the present programs for minority and women students, and

WHEREAS the Board of Regents considers it to be one of the highest educational priorities of the University to provide special educational opportunities to persons from minority groups which have been historically denied access to higher levels of higher education and to women in those professional and academic fields where they have been traditionally grossly under-represented,

NOW THEREFORE, be it resolved by the Board of Regents that:

(1) The Graduate School and the professional schools continue to recognize the need for greater representation of minority groups and/or academic ranks by developing, enunciating and implementing admissions policies which are consistent with the fulfillment of this need;

(2) The Graduate School together with depart-

ments offering graduate degree programs and the professional schools continue to recognize the need for greater representation of women who are under-represented in their professions and/or academic ranks by developing, enunciating and implementing admissions policies which are consistent with the fulfillment of this need;

(3) The Office of Minority Affairs continue to recruit minorities and provide such special educational opportunities as it deems necessary in order that more persons from under-represented minorities may qualify for admission into the graduate and professional schools;

(4) The Office for Minority Affairs-Health Sciences Center and the Office for the Recruitment of Minority Graduate and Professional Students continue their special programs for the increased enrollment and continuing educational support of minority graduate and professional students;

(5) The President of the University, through his designees, identify those areas of special need for increased representation of minority groups in the academic and professional ranks and develop, enunciate and implement programs which be believes will enable the University to help fill that need;

(6) The President of the University, through his designees, provide such special educational opportunities as are deemed necessary in order that more women may qualify for admission into the graduate and professional schools; and

(7) The President of the University, through his designees, identify those areas of special need for increased representation of women in the academic and professional ranks and develop, enunciate and implement programs which he believes will enable the University to help fill that need.